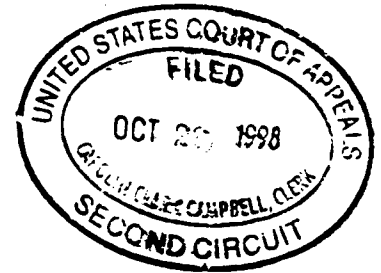


UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT



SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20<sup>th</sup> day of October, one thousand nine hundred and ninety-eight.

PRESENT: Hon. John M. Walker, Jr.,  
                    Circuit Judge,  
          Hon. Michael B. Mukasey,\*  
                    District Judge.  
          Hon. Jane A. Restani,\*\*  
                    Judge.\*\*\*

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KANOWITZ FRUIT AND PRODUCE CO., INC.,  
                    Petitioner,

v.

No. 97-4224

UNITED STATES OF AMERICA and  
UNITED STATES DEPARTMENT OF AGRICULTURE,  
                    Respondents.  
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\* The Honorable Michael B. Mukasey, of the United States District Court for the Southern District of New York, sitting by designation.

\*\* The Honorable Jane A. Restani, of the United States Court of International Trade, sitting by designation.

\*\*\* Pursuant to 28 U.S.C. § 46(b) and an order of the Chief Judge of this Court certifying a judicial emergency, this case was heard by a panel consisting of one judge of this Circuit and two judges sitting by designation.

**APPEARING FOR PETITIONER:**

Sherylee F. Bauer  
Gersen, Wood & Blakeman LLP  
New York, New York

**APPEARING FOR RESPONDENT:**

M. Bradley Flynn,  
Office of the General Counsel  
U.S. Department of Agriculture  
Washington, D.C.

Petition for review of an order of the Secretary of the United States Department of Agriculture.

**ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the petition for review be and it hereby is **DENIED**.

This cause came on to be heard on the transcript of record and was argued.

Petitioner Kanowitz Fruit and Produce Co., Inc ("KFP") petitions for review of an order of the Secretary of the United States Department of Agriculture ("Secretary"), revoking petitioner's license pursuant to the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499a et seq. Petitioner contends, inter alia, that the regulatory scheme implementing the PACA is inconsistent with the purpose of the PACA and the realities of the produce industry, and that the Secretary improperly failed to take into account relevant mitigating circumstances concerning KFP before revoking its license.

After receiving a complaint from a Florida shipper who had sold produce to KFP, the Secretary began an investigation of petitioner. The Secretary subsequently initiated a disciplinary proceeding against KFP by complaint filed November 8, 1994. The complaint alleged that from February through November 1993, KFP failed to make full payment promptly to 18 sellers for 62 lots of produce, resulting in unpaid and past due produce debts totaling \$206,850.60. The Secretary sought a finding by the Administrative Law Judge (ALJ) that KFP willfully, flagrantly and repeatedly violated § 2(4) of the PACA, 7 U.S.C. § 499b(4), and sought the revocation of KFP's license. KFP answered the complaint by denying it had violated the PACA and requested a hearing. KFP asserted that payment had been made within the terms agreed upon between the parties, and that any delays in payment were due to extraordinary circumstances beyond KFP's control--namely, that in 1993 KFP suffered an embezzlement of more than \$200,000 by an employee.

On March 1, 1996, the Secretary filed an amended complaint alleging that the amounts referred to in the original complaint had been paid, but that their late payment--ranging from 2 weeks to 117 weeks late--still violated the PACA. The amended complaint also alleged that, between January 1994 and January 1996, KFP incurred new debts totaling \$195,495.10 for 108 lots of produce, which were past due to 30 sellers. KFP answered by again claiming that it had made payment in full, that payment was made within the terms agreed upon by the parties, and that the mitigating circumstance of the embezzlement excused any delay.

A hearing was held on May 7, 1996 before Administrative Law Judge Edwin S. Bernstein. The Secretary called two witnesses and KFP called two witnesses. At the close of the hearing, the ALJ issued a bench opinion finding that KFP had committed willful, flagrant, and repeated violations of the PACA by failing to make full payment promptly of the 170 lots of produce as alleged in the amended complaint. The ALJ also found that, at the time of the hearing, KFP owed approximately \$125,000 in new debt for orders that had been made since the filing of the amended complaint. The ALJ found that the old debts had been paid by the date of the hearing only by KFP's having "rolled over" its debt, i.e., using the proceeds from the new orders to pay off the old debts. The ALJ held that revocation was the appropriate sanction for petitioner, in light of the "number of violations, the seriousness of violations, the impact of violations on the industry as a whole, the interests of the Department in insuring the trust relationship which exists between members of the industry is maintained, the management decisions made by [petitioner], and the financial status of [petitioner]."

On June 24, 1996, KFP appealed the ALJ's decision to the Department's Judicial Officer ("JO"), to whom the Secretary has delegated final authority in adjudicative proceedings. The JO essentially adopted the decision of the ALJ, with some analysis of his own, by opinion dated March 21, 1997. The JO later rejected KFP's petition for reconsideration by opinion dated June 5, 1997, but granted, upon KFP's request, a stay of the order pending judicial review.

The PACA is a remedial statute designed to ensure that commerce in agricultural commodities is conducted in an atmosphere of financial responsibility. See Harry Klein Produce Corp. v. United States Dep't of Agric., 831 F.2d 403, 405 (2d Cir. 1987). "It is an intentionally rigorous law whose primary purpose is to exercise control over an industry which is highly competitive, and in which the opportunities for sharp practices, irresponsible business conduct, and unfair methods are numerous." Id. (quoting S. Rep. No. 84-2507 at 3 (1956), reprinted in 1956 U.S.C.C.A.N. 3699, 3701)).

The PACA requires all covered entities, such as petitioner, to make "full payment promptly" for all purchases of perishable agricultural commodities received in interstate commerce. 7 U.S.C. § 499b(4). "Full payment promptly" has been defined as, inter alia, payment "for produce purchased by a buyer, within 10 days after the day on which the produce is accepted," 7 C.F.R. § 46.2(aa)(5), unless the parties have agreed, in writing and before entering into the transaction, to different payment terms. 7 C.F.R. § 46.2(aa)(11). If a covered entity does not meet PACA's requirements, the Secretary may, upon notice suspend or revoke an entity's license, or impose a fine. 7 U.S.C. § 499h(a). Revocation is authorized where "the violation is flagrant or repeated." Id. On review, the determination of a sanction by the Secretary will not be upset unless it is found to be "unwarranted in law or without justification in fact." Harry Klein Produce Corp., 831 F.2d at 406 (internal quotation and citations omitted). See also County Produce, Inc. v. United States Dep't of Agric., 103 F.3d 263, 265-66 (2d Cir. 1997).

Here, the ALJ found that petitioner's late payments to at least 48 suppliers over a period of over three years constituted flagrant and repeated violations which were not excused by the embezzlement. We find that the ALJ's factual findings are supported by substantial evidence, and that his conclusion that petitioner's violations were flagrant and repeated did not constitute an abuse of discretion. See Havana Potatoes of New York Corp. v. United States, 136 F.3d 89, 90-92 (2d Cir. 1997). That petitioner engaged in "slow pay" as opposed to "no pay" of its suppliers does not alter our determination, see id. at 94, nor does petitioner's contention that payment was made within the terms agreed upon by the parties.

Under the PACA, parties may agree upon payment terms less stringent than those imposed by the Act, but they must put the terms in writing before the buyer may assert consent as a defense to a violation of the Act's prompt-payment requirement. 7 C.F.R. § 46.2(aa)(11). KFP did not produce any such writing, and there was no evidence that petitioner sought any such written agreements from its suppliers. See Norinsberg Corp. v. United States Dep't of Agric., 47 F.3d 1224, 1227 (D.C. Cir. 1995). Instead, petitioner "continued to make produce purchases without fulfilling the Act's prompt payment mandate." Id. If, as petitioner alleges, PACA's requirements are inconsistent with industry custom or are counter-productive, "Congress is the body that must make that judgment." Havana Potatoes, 136 F.3d at 94. We do not find, given PACA's "prompt payment" requirement, that the Secretary's regulations enforcing prompt payment are "arbitrary, capricious, or manifestly contrary to the [PACA]." Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

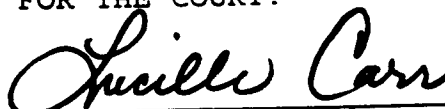
We also disagree with petitioner's contention that the ALJ

failed to consider the embezzlement and other proposed mitigating factors before revoking its license. Our review of the record indicates that petitioner's proposed mitigating factors were all considered, although rejected, by the ALJ. We do not find that the embezzlement suffered by KFP precluded a determination that petitioner's violations were willful and flagrant. See In re S.S. Farms Linn County, Inc., 50 Agric. Dec. 476, 497 (1991) ("A violation is willful if it is done intentionally or with careless disregard of statutory requirements."); Havana Potatoes, 136 F.3d at 94 ("Persistent violations indicate willfulness in the sense that a persistent violator must know when placing orders for produce that some or all will not be paid for in a timely fashion under PACA.").

As we noted recently, "financial difficulties are likely to be the cause of PACA prompt-payment violations in virtually all cases, and the statute would have little meaning if the administrative sanction of license revocation were never used where a buyer persistently violates PACA because of an ongoing lack of funds." Havana Potatoes, 136 F.3d at 94. Finally, petitioner's argument that the sanction here was arbitrary because lesser sanctions have been imposed in similar cases is not availing. See Harry Klein Produce Corp., 831 F.2d at 407 (the "PACA does not require uniformity of sanctions for similar violations.").

We have carefully considered petitioner's remaining arguments and find them to be without merit. Accordingly, the petition is denied and we direct enforcement of the order.

FOR THE COURT:



CAROLYN CLARK CAMPBELL, Clerk  
by: Lucille Carr, Deputy Clerk